UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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DEWEY R. BOZELLA,

Plaintiff,

v. 10 Civ. 4917 CS

THE COUNTY OF DUTCHESS,
et al.,

Defendants.

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White Plains, N.Y.
January 6, 2012
10:40 a.m.

Before:

HON. CATHY SEIBEL,

District Judge

APPEARANCES

WILMER, CUTLER, HALE & DORR
Attorney for Plaintiff
PETER J. MACDONALD
CRAIG R. HEEREN
ROSS ERIC FIRSENBAUM

SHAUNA KATHLEEN FRIEDMAN

PATRICK BURKE
PHYLLIS INGRAM
Attorneys for Defendant Dutchess

PETER ERIKSEN
Attorney for Defendant Poughkeepsie

MOTION

THE COURTROOM DEPUTY: Dewey Bozella v. the County of Dutchess.

THE COURT: Have a seat, everyone. Mr. Macdonald.

MR. MACDONALD: Good morning, your Honor.

THE COURT: Mr. Firsenbaum.

MR. FIRSENBAUM: Good morning, your Honor.

THE COURT: And Mr. Heeren, Ms Friedman. And Mr. Bozella good morning. And Mr. Burke for the County.

MR. BURKE: Yes, your Honor. And Phyllis Ingram is with me.

THE COURT: Is anybody coming for the City?

MR. BURKE: I don't think so, Judge.

THE COURT: That's a little odd.

MR. BURKE: There was some confusion for whatever reason on the defense side as to the timing. I don't know why it occurred. There was confusion. That's why I called chambers to confirm that it was on. I didn't call the City. And that's all I can say.

THE COURT: Have you talked to anybody from the City, Mr. Macdonald?

MR. MACDONALD: No, your Honor. We got notice of the date today and the only thing we heard, I believe we got a call from Mr. Burke's office indicating that we were on. That's what we expected.

THE COURT: I'm just looking on the docket sheet.

This date was in the end of my decision, right?

MR. BURKE: That's what we thought. I don't think the date is at the end of the your decision.

THE COURT: I think it is. But it was for an earlier date.

MR. BURKE: That's what it was.

THE COURT: It was for October. Then we got the motion to reconsider. And here it is, document number 69, the conference previously scheduled for October 24th, which was the date in my decision, is adjourned to January 6th at 10:30. I think we should at less make an effort. We don't think that they're intentionally not here. We think it's just a screw up.

MR. BURKE: That's correct.

THE COURT: Let's see if we can get somebody on the phone. There's three lawyers from the City of Poughkeepsie. Let's try Mr. Gandin first.

(Pause).

MR. ERIKSEN: Hello, this is Peter Eriksen.

THE COURT: This is Judge Seibel. We had a conference on for 10:30 this morning in Bozella. Nobody showed up representing the City.

MR. ERIKSEN: David Gandin isn't there?

THE COURT: Nobody is here.

MR. ERIKSEN: Oh God.

THE COURT: Your secretary or receptionist or whoever

picked up the phone, said he was in court, but she didn't say what court.

MR. ERIKSEN: Well, that's a good question because I don't know what court he's in either. He's been the attorney from this office primarily involved with this case. I've been somewhat tangentially involved, but more involved with insurance coverage issues for the City. So I have no explanation for what happened. It wasn't on my calendar and my assumption is that -- he's been covering the conferences. I don't know what happened. I have no reasonable explanation.

THE COURT: Well, we've got a motion to reconsider pending. I'm going to hear argument and rule on it. So you're welcome to sit in, you are counsel of record, sit in telephonically so that your client is represented.

MR. ERIKSEN: We submitted opposition papers to that, I believe.

THE COURT: Yes, and I've read them and I'm not asking to hear anything that's already been covered in the papers. But if there's anybody who wants to add anything I'll give them the opportunity to do so. So let me start with Mr. Macdonald. Anything that you or your team wants to add that's not in the papers?

MR. MACDONALD: Nothing really in particular, your Honor. I think the papers have tried to address most of the issues. There are some distinctions on particular cases that

we could address. Obviously, we haven't joined issue on all the substantive issues. I do believe that on the cases that your Honor cited on the amendment, I think those are distinguishable on the facts. I think we did try to point that out on my brief.

THE COURT: My main question for you guys is why all these things that I'm hearing now for the first time on reconsideration weren't made part of the record before I ruled.

MR. MACDONALD: Well, your Honor, I think for a variety of the reasons. Part of it has been the nature of this case. We're dealing with a case that involves facts that happened 25, 30 and in some cases 35 years ago, so it's been a very difficult and onerous effort to gather all of those facts. In addition, I think that the approach that the defendants have taken, they have been represented by zealous advocates that have done a very effective job, but as a result I think we've had to push hard to get discovery. And as your Honor knows, we were provided only limited discovery in the first instance.

THE COURT: There are a number of issues that you're raising on the motion for reconsideration that by your own account you knew about before the first motion to dismiss was filed. Wouldn't that have been the time to say to me: Let us amend because we have these new facts or to flag what you regard as a change in law or whatever.

MR. MACDONALD: The change in law issue came long

after the motion to dismiss was briefed.

THE COURT: Come on, a Supreme Court case comes down related to something that you have pending before a court, you can write me a letter. I knew about the case obviously because I discussed it in the original decision. If you think this is a sea change...

MR. MACDONALD: We didn't think it was a sea change, your Honor. We assumed your Honor knew about the case and we also assumed that if your Honor thought additional briefing was necessary, maybe we assumed incorrectly that that --

THE COURT: I don't necessarily, I have enough briefing.

MR. MACDONALD: It's hard to know. You can't brief seriatim.

THE COURT: You can write a letter saying the Supreme Court decided *Connick*, we think this is relevant, can we brief it.

MR. MACDONALD: But there's a lot more in the proposed amended complaint than addressed in *Connick*. In fact, there are new liability theories that were developed based on the evidence that was gathered both before and after *Connick*. And the presumption in the Second Circuit is that if a motion to dismiss is granted, normally leave to amend to address the issues is going to be provided.

THE COURT: That's true. But I have, the reason I

have premotion conferences is in part to avoid exactly this kind of situation. I have a premotion conference, the defendants front what their issues are, we talk about it at the conference. Ordinarily, if the plaintiff is in possession of facts that might address some of those issues, the plaintiff says we have facts that might address some of those issues and ordinarily I say why don't you go ahead and amend now so we save trees and time and all that. And although I can't, I'm not sure what the strategy would be, it seems to me that there was a strategic decision on your side to not do that. Maybe you wanted to save all this stuff and spring it on the defendants later, I don't know.

MR. MACDONALD: That was not the case. Absolutely not the case. We were trying to put our best case forward at the outset of this case. We did a lot of investigation before we submitted the complaint. And I would emphasize, it was an extremely difficult situation.

THE COURT: I don't dispute that.

MR. MACDONALD: In addition, your Honor, the sequence of when we got additional information came throughout the period after the complaint was briefed. We had two motions to compel before Judge Yanthis. We had document productions. We had our own ongoing investigation. We were trying to gather information diligently. There was absolutely no intent to sandbag anybody. If anything, I think we've tried to be very

forthcoming in the complaint and we've gotten criticized for our verbosity in the way we approached it.

THE COURT: You've also been criticized for things that you left out of the complaint that cast a number of things that are in the complaint in a very different light. So you can't win.

MR. MACDONALD: The complaint we've tried to put our best case forward. I think the issue that's happened in this case, the way the defense has approached this is that they put in a lot of factual assertions, and I would submit that those factual assertions are not all they're cracked up to be. But the time to argue about the facts is not at the initial pleading stage.

THE COURT: Agreed, except to the extent that the facts you allege have to be sufficient under the plausibility standard. I assume the facts you related are true and I'm not going to consider, for example, an affidavit where I forget the officers' name.

MR. MACDONALD: Offer Doherty.

THE COURT: Doherty says no, I didn't say those things that are attributed to me. That will be for later. Anything else you want to add?

MR. MACDONALD: I would just add, your Honor, that we have tried our best to be comprehensive. We haven't tried to make this process more onerous than it otherwise would be. I

think that we've done nothing that would be within the category of undue delay or prejudice. I think in the spirit of Rule 15 and in the Williams Citibank decision that the appropriate thing here is to give Mr. Bozella another opportunity to plead his best case so that the case may be decided on the merits.

THE COURT: Mr. Burke, why shouldn't I decide it on the merits?

MR. BURKE: There's a long and a short answer, Judge. The case from the very beginning, from the very stage of the 440 motion forward, had an exquisite lack of central veracity. I don't blame counsel for this. They did a job to put it altogether. But there came a point in time after they did their 440 that they had to know that what they were trying to sell was not marketable, in a legal sense. And that's why I don't think the Court should give them this second bite at an unpalatable apple.

The Court alluded to the standards that we have to live by in the decision, in your basic decision when you denied the opportunity that this had asked for in their motions to replead. And what do they tell us now? They didn't have a chance to brief *Connick* prior to the Court's decision. I don't think that's a valid basis.

We have newly discovered evidence. We pointed out in our papers this is not newly discovered, assuming it's true.

And the third is that the interest of justice compel

this. And if you really want to get into this, Judge, the interest of justice does not compel the Court to allow this case to go forward any further. The plaintiff, as you said in your decision, and as they've told us on a couple of occasions, worked very hard to get the facts together prior to the first complaint. It's obviously carefully crafted. To put within that a terse, formulaic request for an opportunity to amend in case the Court decides that all of this effort that people put in to parse the complaint and to pull apart these many, many allegations, and to point out that they're just not plausible, your Honor, to allow that terse request to say, okay, you blew it the first time, let's come back and we'll do it all over again is not what our rules provide for.

We're not trying to be very technical, Judge. There's a reason for that. Our local rule says you must set forth matters of fact or controlling decision which the Court has overlooked. This Court did not overlook *Connick*. None of us did. We were all watching that come up, Judge. It was cited in the briefs before you rendered the decision. The minute *Connick* was decided we knew. We had ordered the arguments of the attorneys in *Connick* prior to the decision. So *Connick* was not a mystery to anybody. And the intervening decision of *Connick* is not a basis we suggest to this Court to allow the plaintiff to recraft an already faulty complaint.

And it's all reworking the same general themes, Judge,

that *Brady* -- I don't want to go into that. I can if the Court wants. But I think that the papers of both parties adequately address whatever issues the Court needs to decide. I don't mean to belabor the record any more and I appreciate the opportunity to belabor it this much. I'm happy to answer any questions if you want.

THE COURT: No, that's fine, Mr. Burke.

Mr. Eriksen, anything you want to add?

MR. ERIKSEN: No, I agree with Mr. Burke. And I will leave it at that, your Honor.

THE COURT: Okay. The motion is to reconsider that portion of my original decision which is dated September 29th of last year which denied leave to amend. Motions to reconsider are not second bites of the apple, they're a chance for me to correct my own mistakes, for the parties to bring to my attention something that I overlooked or something that I misconstrued. At least that's the primary function of a motion for reconsideration. Everything that the plaintiff raises on this motion for reconsideration is outside that category. They're not things that I overlooked, they're things that were not before me. For whatever reason the plaintiff didn't raise them the first go round.

Another function of a motion to reconsider is new evidence, and there is certainly new information that's being brought to my attention on this motion. But much if not all of

it could have been obtained before the motion and certainly before my decision. For example, the pending motion refers to admissions by ADAs about a policy under *Brady* in which their understanding was that only truly exculpatory rather than simply favorable evidence was to be disclosed. And those statements, which date back to the 80s, were certainly out there and could have been presented. The officer who described the policy of destroying police notebooks could have been and apparently was interviewed before the motion was made. There is a newly discovered piece of paper which is a memorandum from District Attorney Grady to the Chief of the City of Poughkeepsie Police Department, acknowledging the fact that officers had been destroying their notebooks after the information was incorporated into typewritten reports and asking for a stop to that policy. That memorandum is described in the plaintiff's papers and various places as evidencing that the DA requested that policy. There's nothing in the memorandum supporting that notion. The memorandum supports the notion that the DA was aware of it but the memorandum itself doesn't say anything indicating that: At my request the police were destroying notebooks.

The plaintiff advances other evidence to that effect. Likewise that could have been turned up before the motion was made, particularly because the plaintiff knew of the policy and even without the piece of paper could have gotten the

equivalent corroboration of what Lieutenant Doherty had said. The examples that plaintiffs provide of various *Brady* failures in other cases were certainly available long ago. And the evidence that not in this case but in the murder case officers had destroyed notebooks, that was certainly available beforehand.

The only thing that's really new is I think an interrogatory admission by the City and County that they didn't have formal *Brady* training, and that is somewhat shocking. While the acknowledgment wasn't available earlier, the equivalent of the acknowledgment was available earlier. The plaintiff certainly could have dug up witnesses who could have provided the same information. And indeed, the lack of *Brady* training was alleged in the original complaint. So the interrogatory response is new but the allegation is not new. I don't think it's a situation involving new evidence either.

The next basis on which I can reconsider is an intervening change in the law. I don't see that *Connick* worked any kind of sea change. As I said in I think it was footnote 21 of the original decision, the Second Circuit has always required a pattern for *Monell* violations. *Walker*, which the plaintiff cited originally and continues to cite for the proposition that a pattern is not required, does not say a pattern is not required. As I explained in footnote 21, *Walker* was decided under the no longer applicable *Connelly* standard

and *Walker* said, you haven't pleaded a pattern, there needs to be a pattern, but discovery might reveal a pattern, and because under *Connelly* we can't dismiss unless it's inconceivable that there was a pattern, we can't dismiss. But *Walker* was quite clear that there has to be a pattern. Nowadays under *Iqbal* and *Twombly* you have to allege enough facts making your claim plausible. So it seems to me it was quite clear that a pattern needed to be plausibly alleged.

Plaintiff didn't address footnote 21. When *Connick* came along, *Connick* just said *Brady* violations by prosecutors were not an exception to that rule. The *City of Canton* case had a hypothetical exception to the rule requiring a pattern. I don't know that any case other than *City of Canton* has found such an exception. But there's a ton of law in our Circuit. To name just a few. *Dunk v. Brower*, 2009 Westlaw 605352 at page 10, citing the well-settled principle that municipal liability based on a policy of inadequate training cannot be derived from a single incident of misconduct by a nonpolicy-making municipal employee. *Ferreira v Westchester County*, 917 F.Supp. 209. In cases where there's training or where the wrongfulness of the official conduct at issue is blatant -- I think I'm messing up the first part of that quote -- the plaintiff can survive summary judgment only by producing some evidence that the policy-makers were aware of a pattern of unconstitutional conduct and failed to respond. And

that's been applied specifically to *Brady* training in, for example, *Jackson v. County of Nassau*, 2010 Westlaw 1849262, an Eastern District case. The court said: A single incident alleged in a complaint, especially if it involved only actors below the policy-making level, does not suffice to show a municipal policy. Here, plaintiff has not submitted evidence regarding any other incidents of withheld exculpatory material. *McCray v. City of New York*, 2007 Westlaw 4352738. In this Circuit, proof of a single incident of unconstitutional activity is not sufficient to impose liability unless the incident was caused by an existing unconstitutional municipal policy which policy can be attributed to a municipal policy-maker.

In addition, as I mentioned earlier, if *Connick* were a sea change, either side could have asked to brief it. Plaintiff could have asked to amend the complaint before my decision. And I would note parenthetically that the only claim that *Connick* affects is the failure to train claim against the County, which I'll address in a couple of minutes.

So this leaves as the only possible basis for reconsideration manifest injustice, which I understand to mean not whether generally speaking what happened to the plaintiff in this case was manifestly unjust, but rather it would be a manifest injustice not to let the plaintiff amend in the circumstances. Whether that standard of manifest injustice is

met sort of merges with the 12(b)(6) analysis, because at the very least, a claim that isn't going to survive 12(b)(6) is not one where I have to allow amendment to avoid manifest injustice.

Let me lead with the punch line. The only new claim that I'm going to allow is the *Monell* claim against the County for the alleged unconstitutional policy of not disclosing *Brady* material unless it's truly exculpatory. I think that meets not only the 12(b)(6) standard but arguably also the manifest injustice standard because it goes to the core of what went wrong in the prosecution of the plaintiff in the state court and how plaintiff's rights were violated. The remaining claims don't survive my view of a Rule 12(b)(6) analysis for reasons I'm about to describe, and in any event, even if they did, they are really marginally related, if that, to the injustice suffered by the plaintiff in the state case and so would not meet the manifest injustice standard.

Let me start with the *Monell* claims against the City. Specifically, the first, the alleged unconstitutional policy of destroying notebooks after the information was recorded in a typed police report. My understanding of *Brady* is that *Brady* is about turning over information. It doesn't matter if it was written down or not and it doesn't matter in what form it was written down. There's no *Brady* violation if the plaintiff, then a criminal defendant, gets the information. So even if it

was never written down, if it's *Brady* the criminal defendant has to be apprised of it one way or another. Likewise, if the criminal defendant is apprised of it one way or another, I don't think it matters if the way they're apprised of it is through a typewritten report as opposed to handwritten notes. The defendant City cites at page 14 of its brief a Second Circuit case to the effect that it's not a *Jencks Act* or *Brady* violation if the rough notes disappear but the written report incorporates the information. And that's my understanding of the law.

In addition to those cases, there's a case *U.S. v. Vallee*, 304 F. App'x 916, 922. I think that was a *Jencks* case, but the principle, same principle applies. The plaintiff cites to *U.S. v. Harrison* from the D.C. Circuit, and that's obviously from the D.C. Circuit. There are courts that have followed the *Harrison* holding, but even they do not have a bright line rule that the destruction of notes automatically constitutes a *Brady* violation. For example, the Third Circuit in *U.S. v. Ramos*, 27 F.3d 65, acknowledged *Harrison* but stated that the mere possibility that the destroyed notes might have included *Brady* material without more is insufficient and would require too broad a reading of *Brady*, so the defendant has to raise a colorable claim that the investigators discarded rough notes containing information favorable to him and material to his claim of innocence or to the applicable punishment, and that

such exculpatory evidence has not been included in any report provided to defendant.

Obviously, that's not the claim here. As to the notes that were destroyed, there's no allegation with any factual basis that they contained any *Brady* material that was not incorporated into a report which the officers turned over to the DA. *U.S. v. Sullivan*, 919 F.2d 1403, 1427 from the Tenth Circuit says: If destroyed information is material under *Brady*, the government's failure to preserve it is a denial of due process regardless of the good or bad faith of the government. But on the record, the trial court couldn't determine whether the information was material and sent it back. But the point is the information is what needs to be turned over. *U.S. v. Harris* from the Ninth Circuit, 543 F.2d 1247, agrees that the notes particularly relating to the agent's interview of the accused must be preserved, with a finding that no substantial rights of the defendant were affected and that any error was harmless.

So it doesn't seem to me that the policy of notebook destruction is itself any sort of *Brady* violation and there's no evidence that any such policy led to a constitutional violation in plaintiff's case, because the information ostensibly destroyed in the notebooks, Officer Regula's notes of his interviews with the neighbors who said they didn't see anything in front of the Crapser residence, was incorporated

into a report and given to the DA. Those notes seem to me to be *Brady*. Don't get me wrong. That information seems to me to be *Brady*, but nothing that the City police did prevented that information from getting turned over. Regula incorporated his notes into a report, he gave the report to the DA. That discharged the officer's *Brady* obligation. It was the DA that apparently either through negligence or choice didn't turn it over. But the DA didn't withhold it because the DA didn't have it nor did the DA withhold it because the DA only had it in report form and not note form. So the policy of destroying notes as far as I can tell from the complaint simply made no difference in the plaintiff's case. And to the extent the plaintiff is suggesting that the notes may have contained other *Brady* material, that is just sheer speculation.

So I don't find a plausible claim that the policy of destroying the notebooks after information was recorded, was transferred to a police report, led to any constitutional violation in the plaintiff's case. And so I don't think it flies under 12(b)(6) and it's certainly not a manifest injustice if the plaintiff can't advance that claim.

The other claim against the City is an alleged failure to have *Brady* training for the officers. As I said, that's kind of appalling. But again, the amended complaint doesn't have any facts showing that the lack of training either led to frequent deprivations of criminal defendants' rights or led to

any deprivation of the plaintiff's rights in this case. There are allegations about tapes that were destroyed. But there are no allegations that the exculpatory contents of those tapes were not made available. Again, it's the information. So for example, Lamar Smith, when he was first interviewed on tape, said he didn't know anything about anything. He later became an important witness against the plaintiff.

If the existence of that tape, which totally contradicts his trial testimony, was withhold, that would be a *Brady* violation. But the information apparently was not withheld. The information that Lamar Smith had previously made a statement that completely contradicted his trial testimony was available and, to my understanding, used at the trial. So again, I don't find a plausible showing of any violation that affected the plaintiff's case on the part of the officers that arose from the lack of *Brady* training.

Let me turn now to the claims against ADA O'Neill. There are two claims against him. One is the one that survived the first motion to dismiss that he allegedly coerced a witness named Madalyn Faust to recant her exculpatory testimony, testimony that implicated somebody else as the murderer. I don't need to dwell on that at this stage. It's an interesting evidentiary question as to how it can be proved at this point, given that she's no longer available, and some indication she's getting her O'Neills mixed up, but that's for another day.

The second claim that the amended complaint advances against ADA O'Neill is that he directed police officers to destroy handwritten notes after they were incorporated into written police reports. The allegation is not that he directed the destruction of any notes specifically in relation to plaintiff's case, just that he generally, as part of training that he provided to the police officers, generally recommended such a policy. And my analysis of that is basically the same as it was with the City. There's no *Brady* violation if the information is incorporated into a report. And what the plaintiff would be harmed by, was harmed by in this case was the DA's failure to turn over the information, not the destruction of the notes. So I don't think that second claim meets the standard either.

The proposed amended complaint contains a claim against the District Attorney William Grady in his capacity as final policy-maker for alleged personal involvement in suppressing *Brady* materials. The argument goes from plaintiff's side -- and let me back up to say that this relates to the Holland tape in which Mr. Holland, in the course of confessing to the King murder and implicating Donald Wise in that matter, also said that he, Holland, had had a conversation with Donald Wise before the King murder in which Donald Wise said that he had done a murder that sounds very much like the Crapser murder, and this information was not made available to

the plaintiff.

The plaintiff's argument now is that District Attorney Grady must have known about the *Brady* information in the Holland tape because Grady apparently, as an assistant district attorney, covered Donald Wise's arraignment or stood up at Donald Wise's arraignment for the King murder. It does not strike me as plausible that as an ADA standing up at an arraignment -- and let me add the complaint doesn't allege that ADA Grady was the prosecutor in the Wise case or in the King murder case, it just says that he stood up at the arraignment of Mr. Wise -- it's just not plausible to me that as an ADA covering an arraignment apparently for another ADA that Grady must have known not only that the Holland tape existed and that Holland implicated Wise in the King murder but also that in one exchange on that tape Holland implicated Wise in the Crapser murder. It's just too much of a stretch. I'm allowed to use my common sense and experience and the notion that covering an arraignment gives you that thorough knowledge of the underlying evidence is just not plausible.

It's possible, it's conceivable, but as we know under *Iqbal* and *Twombly*, things that are possible and conceivable or consistent with liability are insufficient. So the allegation that Grady personally knew about the statement in the Holland tape, that it sounds like it's about the Crapser murder, it's conclusory, it's just not plausible. Moreover, even if Grady

did know of the statement, there's no allegation that he personally was aware of what was and was not turned over as *Brady* material years later at plaintiff's trial. If there were an allegation that he was involved in trial decisions, he would be immune. But there is no such allegation, and so the claim against him as the final policy-maker for alleged personal involvement in suppressing *Brady* is not plausible.

So that leaves the claims against the County. First is the alleged unconstitutional policy of suppressing *Brady* information unless it was "truly exculpatory." In other words, that the DA's Office and the ADAs interpreted *Brady* as not requiring them to turn over information that was merely favorable or could be used to impeach. The proposed amended complaint in paragraphs 179 to 90, which detail various ADAs taking that position on the record, are sufficient to render such a policy plausible. And there are additional allegations in paragraphs 218 to 228 which, although set forth in the failure to train section of the complaint, also support plausibly the existence of such a policy. And further, the complaint shows that suppression of just such information, in other words information that was not directly exculpatory but was favorable, led to the violation of plaintiff's rights in the Crapser murder case.

For example, the Holland tape doesn't directly exculpate the plaintiff but it implicates somebody else as

having done the crime. The officer's report regarding the neighbors could have been used to impeach Lamar Smith's testimony that he was hanging out outside the residence all evening because the neighbors say they didn't see anybody. And what we're calling the Dobler report, in which Donald Wise was implicated as the perpetrator of a very similar crime against a victim named Dobler who survived, were all favorable to Mr. Bozella and should have been turned over and allegedly were not. So I'm going to allow that claim, even though I have to say I do not understand why it was not included the first time around when it could have been. It does go to the heart of what happened to Mr. Bozella in the state case and as I said, it is plausibly alleged. So I think it meets the manifest injustice standard.

The next allegation against the County is that it had an unconstitutional policy of directing police to destroy notebooks. I'm not going to repeat what I said above regarding the similar claims against the City and O'Neill. In connection with the County in particular, the plaintiff argues that the rule that rough notes don't have to be preserved if the information is incorporated into a report does not apply to the County because the amended complaint alleges that the County had a policy of destruction of notes for the specific purpose of violating *Brady*. I am not at all convinced that a motive like that, which is a bad motive, which is an inexcusable

motive, would absolve the plaintiff of his obligation to come forward with some facts suggesting that the destroyed material was in fact *Brady* materials in his case. There is the *Anzalone* case which mentions that there was no showing that the destroyed notes were *Brady* or that the purpose of the destruction was to prevent the defense from having them. But we could not find any cases that said affirmatively that if that were the purpose, it would be a *Brady* violation without any showing of what was in the notes that would have mattered. So I'm not convinced that a bad motive like is alleged here, a motive to violate *Brady*, that a bad motive for a policy as opposed to having such a motive for destruction in an individual case would absolve the plaintiff of his obligation to come forward with some facts plausibly showing that the destroyed materials were in fact *Brady* in his case.

The argument here seems to be that there was a policy and there was a bad motive for the policy, end of story. Even if I felt that the negative pregnant, I think it is, of *Anzalone* was the law, it seems to me that it refers to a showing that the notes were destroyed to prevent the particular defendant from having them. But in any event, aside from there being no evidence that there was anything in those notes that would have been *Brady* material, even assuming that the DA's Office directed that policy, I have to say I also don't find plausible the amended complaint's allegation that the

destruction of the notes was done for the express purpose of violating *Brady* which is what the complaint says.

I'm ignoring the affidavit that the County has submitted from Doherty because they're not properly submitted on a motion to dismiss. What the plaintiff attributes to Doherty is on the one hand he had never heard of *Brady*, that's in paragraph 262, and on the other, the DA's Office directed the destruction of notes for the express purpose of violating *Brady*. It's hard to imagine that Doherty could have attributed that motive to the DA's Office if he never heard of *Brady*. As reprehensible as that would have been, again there's no evidence of any *Brady* violation involving destroying notes in plaintiff's case so I don't find it a manifest injustice to not allow amendment of the complaint to advance this claim, which I note apparently plaintiff's counsel didn't find compelling enough to include originally either, even though Lieutenant Doherty spoke to them early on.

The third claim against the County is that *Brady* is based on District Attorney Grady as a final policy-maker. I won't repeat what I said earlier on that.

And finally, the plaintiff alleges the failure to train against the County regarding *Brady*. Even with the new allegations, they do not in my view show a pre1990 pattern of violations that demonstrated an obvious need to train ADAs on *Brady* as the *Connick* case requires. The plaintiff alleges

facts about the *West* case from 1986 and if what is alleged to have happened in that case is true, that certainly would be a *Brady* violation. But there was no ruling in that case that would have constituted notice to the policy-makers, and the policy-makers have to have been aware of the pattern of constitutional misconduct. There has to be some sort of notice.

The proposed amended complaint discusses the *Speeding* case. The same is true with respect to that case. Plus there's no indication that that case occurred before the plaintiff's case and would have put anybody on notice of anything.

The *Taylor* decision, that's a decision that presumably would be some notice to the DA, but it came out after the plaintiff's trial.

The *Williams* case. It's not clear to me that this would have been notice to the DA. It looks like in the complaint it was a verbal comment in court rather than a decision, but even if it would have been notice, there's no allegation that it occurred before the plaintiff's case.

And the *Britton* case in 1989 was not a *Brady* case. It had to do with destruction of notes under the *Rosario* case, a state case, which imposes on prosecutors a much broader obligation than *Brady*. And even there there was no judicial finding of a violation.

So even with the new information, I don't find a plausible pattern of violations that would have provided sufficient notice to the policy-makers that their decision not to train on *Brady* can be said to have been deliberate. So I don't think the 12(b)(6) standard post *Connick* is met on the manifest injustice standard.

Those are my rulings. I'm going to let plaintiff file an amended complaint that conforms to my decision. How long would you like, Mr. Macdonald, to get that first amended complaint filed?

MR. MACDONALD: I would say if we could get it in 30 days from the transcript if that's acceptable to your Honor.

THE COURT: Let's say February 6th. I'll make it February 13th to give you a week to get the transcript and then the plaintiff gets 30 days. You're proceeding with discovery under the guiding hand of Judge Yanthis. I don't remember what the cutoff is or if he's adjusted it or anything.

MR. MACDONALD: I think everything is a little bit up in the air right now because the original plan was that there be a period after the decision and amendment. I think we have to go back to Judge Yanthis reasonably soon and there are some open issues I think that we would probably need to address obviously in light of the rulings that your Honor has made and in particular with respect to the surviving claim on the *Brady* policy because that implicates obviously a number of cases.

And in some instances there's been some discovery jousting about at least one of those cases, the *Wood* case, where at the time Judge Yanthis did not believe that that was discoverable. But I think in light of your Honor's ruling today it would be since that's one of the cases from which the affidavit was drawn.

THE COURT: Once you have the transcript, provide a copy of it to Judge Yanthis and let him know the ball is back in his court. And I'll get to you guys when discovery is complete and I'm sure then I'll have another lovely round of motions.

MR. MACDONALD: I think there's a conference scheduled before Judge Yanthis on Thursday of next week, so it's fortuitous timing.

THE COURT: You can go ahead with him. Do I have a date with you? I guess what I'll do is, Mr. Macdonald, I'll put it on you to let me know when Judge Yanthis is finished with discovery and I need to have you back in on a conference.

MR. MACDONALD: From this point forward, your Honor, I will err on the side of contacting the Court in any situation. Thank you.

MR. BURKE: Your Honor, the telephone conference, and this is in the same venue of where are we on conferences, is scheduled for the 11th. Whatever that is, we'll get that straightened out and speak to Judge Yanthis going forward.

THE COURT: You should all be here on the same day, although I guess Mr. Eriksen is off the hook.

We are adjourned. Thank you.

(Proceedings adjourned)